

**California Regional Water Quality Control Board
Santa Ana Region**

January 22, 2004

ITEM: 13

SUBJECT: Order No. R8-2004-0018 and Administrative Civil Liability Complaint No. R8-2003-0105, Michael Hearn dba KDG Investments and Sampson Industrial Park, Inc.

SUMMARY

The matter before the Board is to consider adoption of Order No. R8-2004-0018, which affirms Administrative Civil Liability Complaint (ALCLC) No. R8-2003-0105. The Complaint was issued by the Executive Officer on September 4, 2003 to Michael Hearn, dba KDG Investments and Sampson Industrial Park, Inc. Michael Hearn is alleged to have violated California Water Code (Water Code) Section 13376 when, without prior notification or authorization, he discharged, or caused to be discharged, fill to approximately 0.15 acres of a riparian drainage that is a water of the United States. The maximum amount of liability that the Board could assess administratively under Section 13385(c)(1) for the discharge, is \$110,000. The assessment proposed in ALCLC No. R8-2003-0105 is \$110,000.

BACKGROUND

California Water Code (CWC) Section 13376 states that "any person discharging dredge or fill material or proposing to discharge dredged or fill material into the navigable waters of the United States within the jurisdiction of this state shall file a report of the discharge in compliance with Section 13260". Section 13260(a) of the CWC requires that any person discharging waste or proposing to discharge waste within any region, other than to a community sewer system, that could affect the quality of the waters of the State, file a report of waste discharge (ROWD). Under federal Clean Water Act (CWA) Section 401, every applicant for a federal permit or license for any activity that may result in a discharge to waters of the United States must obtain State Water Quality Certification (Certification) that the proposed activity will comply with state water quality standards. Most Certifications are issued in connection with U.S. Army Corps of Engineers (Corps) CWA Section 404 permits for dredge and fill discharges. An application for State Water Quality Certification constitutes a ROWD for dredge and fill discharges.

FINDINGS

On March 19, 2003, Board staff was contacted by Karen Kirtland, of Natural Resources Assessment, Inc., the agent representing Michael Hearn, by telephone.

During that discussion, Ms. Kirtland described a pending 401 application involving impacts to a water of the US located on a commercial site off of Sampson Street in the City of Corona (the proposed Sampson Industrial Park). Board staff informed Ms. Kirtland of the need to mitigate for discharges of post-construction pollutants from the site as well as for direct impacts to the water of the US. On March 28, 2003, Board staff received an application for Clean Water Act Section 401 Water Quality Standards Certification (certification application) for the proposed Sampson Industrial Park, located between the 91 Freeway and Sampson Avenue and east of McKinley Street in the City of Corona (see Figure 1 below).

LOCATION MAP:

NOT TO SCALE

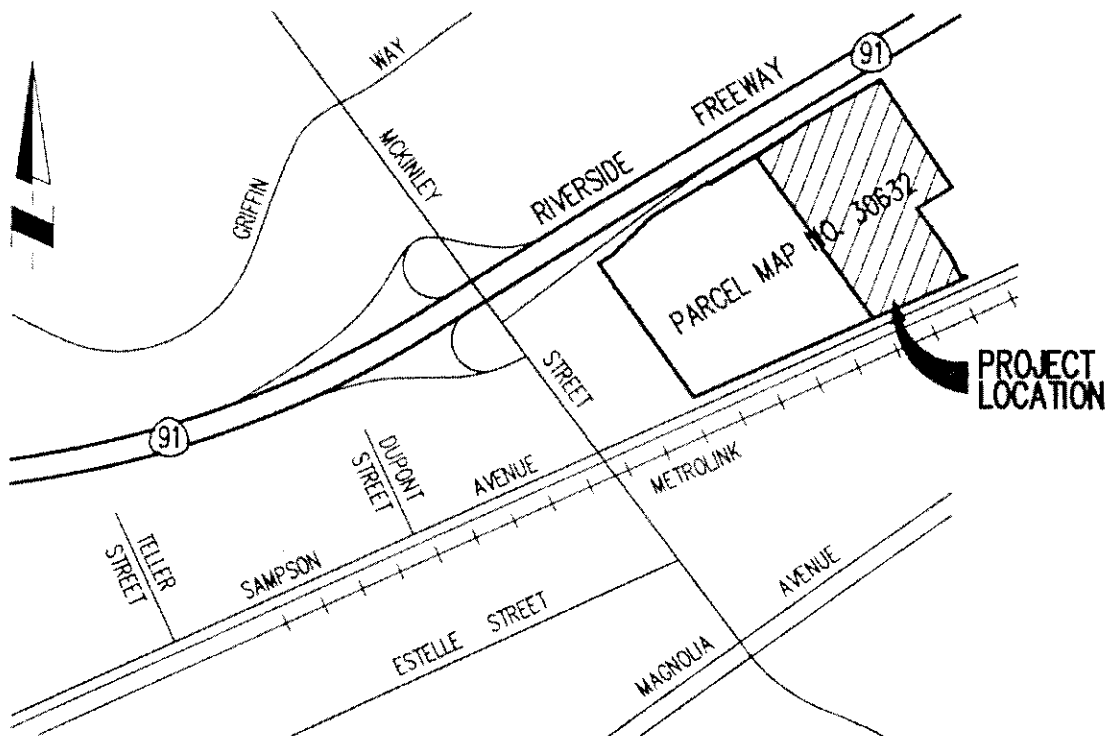


Figure 1: Location Map for Sampson Industrial Park (source: WQMP, 5/12/03)

The project consists of the subdivision of 29.5 acres into 21 parcels for both commercial and industrial purposes. The documents submitted with the certification application included a phase one environmental site assessment for the project site and adjacent parcel (APNs 139-230-028 and 139-240-016, respectively), dated September 2002 and prepared by Phase One, Inc. for Charles Poss, the former property owner. That site assessment includes a reference to an off-site drainage, with no other location description.

The application package also included a general biological assessment of the project site and the westerly adjacent property, prepared by Natural Resources Assessment, Inc. and dated September 9, 2002. The assessment identifies that "a small jurisdictional drainage and riparian area is located in the eastern portion of the property", totaling 0.04 acres. The assessment also states that "the project proponent will have to contact the CDFG and the Corps to determine if a 404 Permit and a 1603 Agreement will be required prior to project implementation".

The City of Corona states in their Planning Commission Staff Report for their March 10, 2003 meeting that the project "will impact [the] drainage course from both on-site and off-site grading" and that the conditions of approval "required the applicant, prior to issuance of any grubbing, rough, or precise grading permits...to coordinate with the California Department of Fish and Game and the Army Corps of Engineers to determine if a 404 Permit and 1603 Agreement, respectively [sic], are required for development." The 401 certification application package includes a copy of the City of Corona Planning Commission Staff Report stamped as being received by Michael Hearn's civil engineer, K. W. Lawler & Associates, Inc. on March 10, 2003.

The March 28, 2003 cover letter transmitting the certification application, submitted by Natural Resources Assessment, Inc. indicated that no drainages would be impacted with respect to fill. Consistent with that, the 401 certification application form indicated that between zero and 0.01 acres (436 square feet) of jurisdictional waters expected to be impacted. The 401 certification application form itself was signed by Michael Hearn, and dated March 21, 2003.

To address the apparent inconsistency between the information contained in the September 9, 2002 biological assessment and the March 28, 2003 certification application regarding potential impacts to waters of the United States (0.04 acres versus less than 0.01 acres impacted), by letter dated April 9, 2003, Board staff requested additional information characterizing the impacts to the identified drainage. On April 18, 2003, Natural Resources Assessment, Inc. submitted additional information regarding the expected impacts of the project on the jurisdictional drainage. In that information packet, Natural Resources Assessment, Inc., again states that "no streambed will be impacted by the project". The agent further explained that initial descriptions of the drainage lying along the eastern property boundary line were incorrect and that the boundary lines had been more precisely mapped. The boundaries had shown that the property "does not have any drainages, nor will the proposed project impact any drainages or riparian habitat". However, the agent further explained that "the project will require paving over a segment of land connecting the existing, off-site drainage and an existing pipe on the property that conveys water off-site under the street [Sampson Avenue]. It is this segment that was identified as jurisdictional by the Corps". A letter dated March 21, 2003 from the Corps, indicating that a Section 404 permit was required, was also included in the April 18, 2003 submittal. Since the 404 permit was required, a 401 certification was also required for this aspect of the project. The application submitted on March 28, 2003 requested this certification.

During an on-site meeting on April 21, 2003 with Michael Hearn and his agent, Board staff observed site conditions surrounding the eastern adjacent drainage. Board staff was shown and observed property line stakes along the top of a manufactured slope with the drainage along the toe of the slope. Both the agent and Mr. Hearn asserted that impacts to this eastern jurisdictional drainage were limited to that southern segment of the drainage, adjacent to Sampson Avenue, described in the April 18, 2003 submittal from the agent. Both the agent and Mr. Hearn also asserted that no impacts would occur to the slope or to the drainage lying at the toe of the slope at the northern portion of the site. Both informed Board staff that the slope and drainage along its toe were off-site (see Figure 2 below). Based on their knowledge of regulatory requirements pertaining to fill activities (as reflected by the submittal of a 401 certification application, signed by Mr. Hearn, on March 28, 2003) these parties were aware that, should any such impacts to this drainage be proposed, notification and a 401 certification would be required that would address those impacts.

Following the April 21, 2003 meeting, Board staff, Mr. Hearn, his agent, and civil engineer, K. W. Lawler & Associates, Inc., began developing mitigation for impacts related to discharges of pollutants from the future commercial and industrial site. During the course of that work, Board staff had conversations with Mr. Hearn's agent on May 5, 2003, on May 8, 2003 (two discussions), May 19, 2003, and June 4, 2003. Board staff had conversations with Kerry Lawler, of K. W. Lawler & Associates, Inc., on May 13, 2003, and June 9, 2003 (two discussions). Telephone discussions occurred with Mr. Hearn on May 13, 2003, and May 22, 2003 (two discussions). In addition, a meeting was held with Mr. Lawler on May 23, 2003. During the course of those discussions, none of these parties indicated any changes in the expectation that no impacts to the northern portion of the jurisdictional drainage would occur.

On June 12, 2003, Board staff conducted an unscheduled inspection of the proposed Sampson Industrial Park site. Board staff observed that the northern portion of the easterly adjacent drainage had been excavated and that riparian vegetation had been removed from the portion of the drainage along the manufactured slope observed during the earlier site visit on April 21, 2003. Within the excavated area, Board staff observed that the former slope had been cut out to a vertical dirt wall, with a PVC pipe overlying gravel at the bottom of the excavated area. Within the excavated area was a small stream of water flowing along and outside of the PVC pipe. Active grading was observed on the site, including a bulldozer pushing dirt to cover both the pipe and the flowing water. The southern portion of the drainage, also containing riparian habitat, had not been excavated except for a small amount of fill placed at its intersection with Sampson Avenue, apparently for equipment crossing (see Figure 2).

excavated for the purpose of installing a French drain in order to stabilize the slope. According to the geotechnical staff, the potential slope instability was caused by the presence of saturated soils at the base of the slope. The geotechnical staff further explained that the observed flowing surface water was rising groundwater. In interviewing the on-site grading supervisor, Board staff learned that the decision to install the French drain had been made one week to two weeks earlier, at the recommendation of the geotechnical staff.

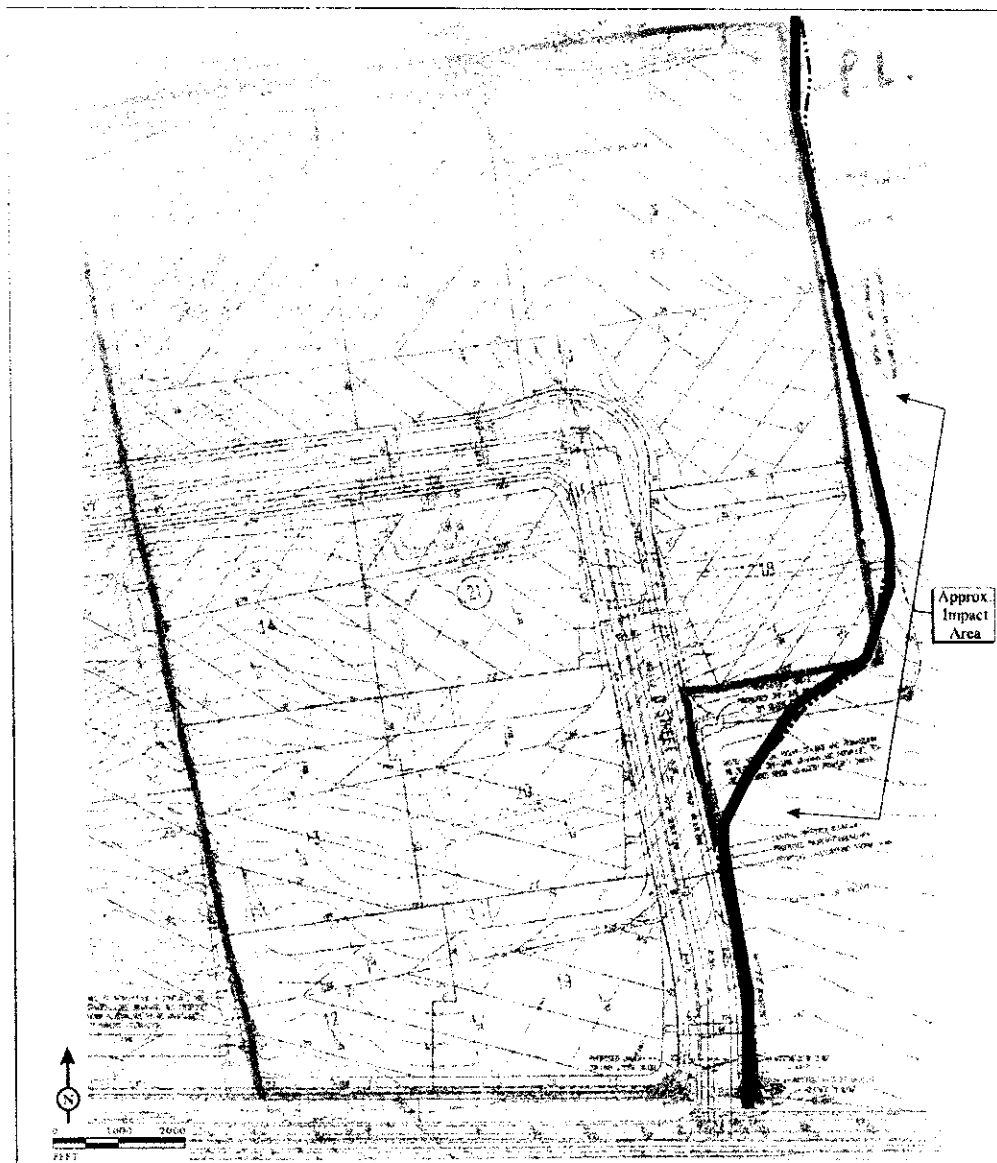
On June 12, 2003, Board staff contacted Mr. Hearn's agent, Natural Resources Assessment, Inc. via telephone and learned that they were not aware of the ongoing fill being discharged to the drainage. Board staff then contacted Kerry Lawler via telephone and informed him that a bulldozer was filling waters of the State. Board staff informed Mr. Lawler that this activity was a discharge of fill without submitting a report of discharge and a violation of California Water Code (CWC) Section 13376. Board staff recommended that they stop work on the fill operation.

On June 12, 2003, in response to Board staff's discussion with Mr. Lawler, Michael Hearn contacted Board staff via telephone. Board staff informed Mr. Hearn of the violation and recommended that they stop work on the fill operation. Board staff requested that Mr. Hearn submit an amended certification application to include the observed impacts to the eastern drainage. Mr. Hearn alleged that he had received a notice from staff at California Department of Fish & Game (CDFG) approving of the fill operation. Board staff requested that a copy of that approval be submitted.

On June 25, 2003, Board staff conducted a follow-up site visit at the proposed Sampson Industrial Park. Board staff observed that a manufactured slope had been constructed at the location of the excavation first observed on June 12, 2003. Board staff observed water flowing along the toe of the slope; however, this flow percolated before connecting with the remaining riparian drainage towards Sampson Avenue. Water was also observed flowing from the French drain where it terminated at the south side of the new slope and into the remaining riparian drainage. Board staff also met with the on-site grading supervisor and learned that neither Mr. Hearn, his agent, nor Mr. Lawler had contacted him to change or stop grading with respect to the east slope and drainage despite the advice to do so by Board staff on June 12, 2003. He also informed Board staff that grading on the east slope had continued for three days after Board staff's observation of the fill activity, until June 15, 2003.

On June 19, 2003 Board staff contacted Mr. Hearn's agent and began discussions regarding mitigation efforts for the impacted drainage. Additional telephone discussions took place on June 25, 2003 (two discussions). On June 30, 2003, Mr. Hearn contacted Board staff and continued ongoing discussions on pollutant mitigation from the commercial site and additional mitigation for the filled drainage. Mr. Hearn alleged that the installation of the French drain had replaced an existing drain and that he had instructed the grading staff to stay out of the drainage.

On July 11, 2003, the Executive Officer sent Mr. Hearn a Notice of Violation (NOV) informing him that the fill of the drainage constituted a violation of CWC Section



LSA JURISDICTIONAL WATERS/STREAMBEDS
OF THE U.S.

FIGURE 2

Sampson Industrial Park
Jurisdictional Waters/Streambeds of the U.S.
SOURCE: K.W. LAWLER AND ASSOCIATES, INC., 1999
P. 277556D1 Graphics 901, plot scale 1:6000

Figure 2: Approximate areas of impact to waters of the US east of Sampson Industrial Park. Blue denotes area of impact for which no report of discharge was submitted; Green is the un-impacted area; and Red is the area for which a 401 Certification was originally sought. Note the property line denoted by "PL"; the slope and majority of the drainage lie immediately east of the property line. Colored graphics are added.

Board staff interviewed both the on-site grading supervisor and the geotechnical staff present on site. Board staff was informed by the geotechnical staff that the area was

13376, and requesting that an amended application be submitted by August 15, 2003. On July 21, 2003 Mr. Hearn contacted Board staff and explained that he was sending a response to the NOV, and that he was trying to get a copy of the CDFG notice sent also. At that time, Board staff requested that Mr. Hearn provide signed and dated copies of pre- and post-city approval rough grading plans. Later that day Mr. Hearn informed Board staff that pre-approval copies of the rough grading plans were not available but that he would provide a copy of the approved plans.

The same day (July 21, 2003), Mr. Hearn sent a written response to the Notice of Violation via facsimile. In that response, Mr. Hearn states that during the site visit with Board staff on April 21, 2003, "at no time did I believe that there would be an impact on that drainage". Mr. Hearn repeated that the installation of the French drain was replacement work and that "both the graders and the geotechnical firm were advised that the drainage and water which was feeding the drainage area to the east of our project could not be disturbed".

Mr. Hearn's letter also modified his earlier statement indicating approval from CDFG, made in the June 12, 2003 telephone discussion with Board staff. His letter alleged that "we had received written notification from [CDFG] that they did not care to take jurisdiction over the drainage area." Mr. Hearn's letter indicated that the notice from CDFG would be attached to the copy of the letter being sent by regular mail. However, when Mr. Hearn's letter was received on July 23, 2003, the notice was not included. Mr. Hearn's statements are unusual and inconsistent in that, while alleging that he had approval for his impacts to the riparian drainage from CDFG, he had nevertheless instructed grading staff to avoid the drainage (In any case, CDFG approval does not obviate the need for Mr. Hearn to comply with 401 certification requirements, of which he was clearly aware.).

On July 14, 2003, Board staff met with the on-site grading supervisor. The grading supervisor confirmed Mr. Hearn's claim that there had been an existing French drain that had been replaced. The grading supervisor could only partially support Mr. Hearn's claim, made in the telephone conversation on June 30, 2003, that he had been instructed to stay out of the drainage. The grading supervisor explained that Mr. Hearn had indicated that grading activities should disturb as little of the adjacent property as possible. To that end, the grading supervisor had consciously avoided the southern, lower portion of the drainage and expressed that had he been free to do so, would have removed the lower, southern portion of the drainage also in order to reduce the labor needed to grade the adjoining parcel. However, the grading supervisor also explained that Mr. Hearn's implied wish to avoid the upper portion of the drainage would be contrary to the grading plans that had been provided by the civil engineer, K. W. Lawler & Associates. Grading within the upper portion of the drainage was unavoidable in order to complete the grading work.

On July 24, 2003, Board staff received a copy of the approved rough grading plans for Sampson Industrial Park. The plan sheets are, with one exception, dated March 24, 2003 and are signed and dated by Mr. Hearn's civil engineer, Kerry Lawler, on April 21, 2003. The plans indicate that the new eastern manufactured slope would

both cover portions of the drainage and encroach into other portions of the drainage. The manufactured slope is also shown to add an additional building pad by extending the manufactured slope southward and over the drainage. These rough grading plans do not comport with the information provided in the 401 certification application concerning impacts to the jurisdictional drainage. It should be noted that by adjusting the manufactured slope and extending it southwards, Mr. Hearn has added a minimum of 0.15 acres of usable land to his property, as suggested by his amended certification application, discussed below.

It is also notable that the date of the approved grading plans, March 24, 2003, pre-dates the certification application date of March 28, 2003, and that the date of Kerry Lawler's signature, April 21, 2003, is the same day on which Mr. Hearn and his agent personally, and at the project site, informed Board staff that no impacts would occur to the drainage and slope along the northern portion of the drainage. The exception to the date of the grading plans is sheet 6 of 6, which is dated January 27, 2003. Sheet 6 of 6 shows the layout of the subdivided parcels overlaying the site's original elevation contours. The elevation contours show that portions of the project would impact a greater area of waters of the US than what was originally stated in the certification application and that the impacts would be the result of off-site as well as on-site grading, as noted in the City of Corona's Planning Commission Staff Report. The plans, along with the City of Corona's Planning Commission Staff Report, demonstrate that the impacts observed by Board staff on June 12, 2003, were anticipated well before the submittal of Mr. Hearn's original certification application and before discussions with Board staff. Had Mr. Hearn been unaware of these impacts in March 2003, the discussion on April 21, 2003 should have triggered action on his part to confirm that no impacts would occur, such as by review of the grading plans, and to revise his certification application accordingly. Mr. Hearn did not pursue this course of action.

On August 6, 2003, Board staff contacted, by telephone, the grading company hired by Mr. Hearn to install the French drain. The grading company staff informed Board staff that their records show that initial materials for installing the drain were delivered to the job site on May 29, 2003 and final materials were delivered on June 5, 2003. The grading company staff concluded that the excavation for the installation of the French drain first took place on June 5, 2003.

On August 12, 2003, Board staff was contacted by staff for Princeland Properties, Inc. (Princeland), the landowner for the eastern adjacent parcel where the jurisdictional drainage was located. Princeland staff initiated this contact in response to Board staff inquiries. Board staff requested information on discussions with Mr. Hearn regarding grading on the Princeland property and informed Princeland staff of the violation that had occurred. Upon investigation, Princeland staff found that Mr. Hearn had contacted them at an unspecified time for the purpose of seeking permission to grade on their property. Princeland staff informed Board staff of the contact with Mr. Hearn and denied knowledge of the jurisdictional drainage in an electronic mail message to Board staff, dated August 12, 2003.

On August 13, 2003, Board staff received copies of portions of Mr. Hearn's application package, received by CDFG on March 7, 2003, for a Streambed Alteration Agreement from CDFG. Among the received items is the notification from CDFG, dated March 13, 2003, that CDFG would not require a Streambed Alteration Agreement based upon information provided in Mr. Hearn's application. In the Streambed Alteration Agreement application form, signed by Mr. Hearn and dated March 4, 2003, Mr. Hearn alleges that "development will not effect the drainage as it will still run down the east side of the property". The site plan supplied to CDFG does not show the development relative to the drainage and it is apparent that, without having the pre-city approval rough grading plans or similar documentation, CDFG staff relied heavily on Mr. Hearn's written statements asserting that there would be no project-related impacts to the drainage.

As a result, CDFG issued the letter dated March 13, 2003, stating that a Streambed Alteration Agreement was not required as long as the project activities would be conducted as described in the notification package. These activities were consistent with and limited to the activities identified in the March 28, 2003 401 certification application. CDFG's letter also states that if the project changes, Mr. Hearn was to notify CDFG in writing prior to initiating any activities. CDFG staff has confirmed that Mr. Hearn provided no such notification and that the March 13, 2003 letter does not apply to the discharges of fill to the northern portion of the drainage shown on the approved rough grading plans. CDFG staff has no other record of any additional approvals for Mr. Hearn's grading activities and has indicated their intent to pursue independent enforcement action.

Subsequent to the discharge of fill to the drainage, Mr. Hearn hired LSA Associates as his agent, in order to develop a mitigation plan for the loss of the drainage. LSA completed an assessment of the impacted area and concluded, in an amended 401 certification application submitted on August 7, 2003, that the impacted area totaled an estimated 0.15 acres of lost jurisdictional waters of the US. On August 28, Board staff contacted Natural Resources Assessment, Inc. to discuss the nature of the delineation completed for the original certification application to clarify the apparent discrepancy between their reports and LSA's assessment. Natural Resources Assessment, Inc. staff explained that no formal delineation of waters of the US had been completed and that the 0.04 acres cited within the application applied only to the estimated jurisdictional waters expected to be impacted at the southeast corner of the project site and not to the entire drainage.

In summary, the evidence demonstrates that Mr. Hearn was aware of the need to file a 401 certification application (in essence, a ROWD), for project impacts to waters of the United States. Mr. Hearn was advised of the need to do so by his agent in a September 2002 report, and he signed a certification application form on March 21, 2003, acknowledging that his project would impact waters of the United States (although not to the extent that actual impacts have occurred). Mr. Hearn was also made aware of the need to mitigate for impacts to waters of the US during the telephone discussion with his agent on March 19, 2003, prior to his submittal of his original certification application.

The evidence also demonstrates that Mr. Hearn was aware that impacts to waters of the United States would occur beyond those identified in the certification application, signed by Mr. Hearn and filed by his agent on his behalf. Mr. Hearn had also prepared a rough grading plan, dated March 24, 2003, which includes a site plan sheet dated January 27, 2003, that demonstrates that more widespread impacts to the jurisdictional drainage would occur as the result of project development irrespective of the installation of the French drain. The City of Corona's Planning Commission Staff Report, received by Mr. Hearn's civil engineer on March 10, 2003, indicates that off-site impacts were expected to occur. These additional expected impacts were not disclosed in the certification application. Even if Mr. Hearn was unaware of these plans and their ramifications, he was certainly aware at the time the materials required to install the French drain were delivered (May 29, 2003) that impacts to this drainage would occur. Despite this, Mr. Hearn took no steps to notify Board staff or to modify the certification application. Furthermore, Mr. Hearn took no steps to stop the discharge of fill when advised to do so by Board staff on June 12, 2003.

Mr. Hearn asserts variously that he had no knowledge of the impacts of the project beyond those identified in the certification application and that he had approval for those impacts from CDFG. (As noted earlier, these arguments are inconsistent, and the latter argument is irrelevant.) In contrast, the rough grading plans, later obtained by Board staff, indicate that Mr. Hearn was aware of the additional impacts as early as January 27, 2003. The City of Corona's Planning Commission Staff Report, received on March 10, 2003, indicates that off-site grading, as observed on June 12, 2003, would also impact the drainage. After conferring with CDFG staff, Board staff has no reason to believe that Mr. Hearn will be able to furnish the alleged documentation of CDFG's approval of the additional impact because the documentation is not known to exist according to CDFG staff. In any case, as indicated earlier, CDFG approval (or lack thereof) does not obviate the need for compliance with 401 certification requirements. Again, Mr. Hearn took no action to stop the unauthorized fill activities when advised by Board staff to do so on June 12, 2003. To date, construction work on the Sampson Industrial Park continues unabated, despite the lack of a 404 permit from ACOE, 401 certification from the Regional Board, or legitimate 1603 Agreement from CDFG.

Regional Board staff has considered staff costs in determining the amount of the civil liability. Approximately 101 hours of Board staff time has been spent on pre-hearing investigation, administration, and hearing preparation for the civil liability complaint. An additional 6 hours of Board staff time is anticipated to be spent on post-hearing processing of the complaint. The total Board staff costs have been calculated at \$7,500.00.

DISCUSSION

Water Code Section 13385(e) specifies factors that the Board shall consider in establishing the amount of civil liability. These factors are discussed below:

1. Nature, Circumstances, Extent and Gravity of the Violation

The discharge identified above occurred is a violation of Water Code 13376 by Michael Hearn's failure to submit a report of discharge of fill to waters of the US (401 certification application) and to receive appropriate authorization. Water Code Section 13385(c)(1) provides that the Board may impose administrative civil liability for violation of Water Code Section 13376 in an amount that shall not exceed ten thousand dollars (\$10,000) for each day in which the violation occurs. Therefore, the maximum amount of liability that the Board could assess administratively under Water Code Section 13385 (c)(1) for the discharges occurring from June 5, 2003 to June 15, 2003, is \$110,000.

Mr. Hearn's discharge of fill has resulted in the destruction of 0.15 acres of a water of the US and the destruction of an unknown acreage of riparian habitat associated with the drainage. Mr. Hearn's original certification application indicated impacts to 0.01 acres of waters of the US and no impacts to riparian habitat. Despite being aware of the additional impacts, shown on the rough grading plans for the project site, as early as January 27, 2003, Mr. Hearn made no voluntary effort to amend his original certification application. Had Mr. Hearn notified Board staff of the impacts as they have occurred, Mr. Hearn would have been required to mitigate those impacts through 1) avoidance of the drainage by modifying his grading plan or other means, 2) restoring the drainage and riparian habitat as near to its original location as possible, or 3) contributing to an off-site mitigation bank. Mr. Hearn failed to notify all persons (Princland Properties, Inc., his agent, CDFG, and Board staff) whose involvement in such mitigation efforts is necessary. Mr. Hearn's prior knowledge of the impacts and failure to bring those impacts to the attention of the interested parties, represents an apparent conscious effort to withhold relevant information from those parties. Even had Mr. Hearn been unaware of the additional expected impacts, he failed to stop the unauthorized discharge of fill when advised by Board staff to do so.

2. Ability to Pay the Proposed Assessment

Board staff has no information to indicate that Michael Hearn would be unable to pay the proposed assessment.

3. Any Prior History of Violations

Board staff has found no prior history of violations.

4. **Degree of Culpability**

Michael Hearn is entirely culpable for the discharge of fill observed on June 12, 2003 and occurring between June 5 and June 15, 2003. Although Mr. Hearn has repeatedly denied prior knowledge of the discharge, Board staff has collected documentation showing that the discharge, to the extent observed on June 12, 2003, would be necessary in order to complete the rough grading. The rough grading plans indicate that Mr. Hearn had knowledge of the need to fill the northern portion of the off-site drainage as early as January 27, 2003 and the City of Corona's Planning Commission Staff Report, recognized the impacts to the drainage and advising coordination with the regulatory agencies. There is no reason to believe that Mr. Hearn would not be cognizant of the grading plans, and Mr. Hearn's civil engineer is known to have received the Staff Report. Based upon information provided by the grading company that did the installation work for the French drain, Mr. Hearn would have known with certainty that the drainage would need to be filled as early as May 29, 2003, the day that requisite materials were first delivered to the job site. At no time did Mr. Hearn make any voluntary effort to revise his certification application to address these new project impacts.

Michael Hearn, through his legal counsel in a meeting with Board staff on November 13, 2003, has indicated that the violation occurred, in part, as the result of his own lack of experience in land development. Because dischargers who violate CWC Section 13376 are strictly liable, this argument lacks merit. However, it is notable that Mr. Hearn is a practicing lawyer specializing in building construction defects. In the course of his practice, Mr. Hearn has access to "unimpeachable" building industry experts, according to his firm's web site, including the services of his civil engineer, Kerry Lawler, who was made aware of the off-site impacts of Sampson Industrial Park's grading plans to the drainage in the City of Corona's Planning Commission Staff Report dated March 10, 2003 and through his own knowledge of the grading plans.

Mr. Hearn is further culpable in that, although advised by his agent of the need to obtain a 404 permit from the Corps in the agent's biological assessment dated September 9, 2002, and although he was clearly aware of the need to obtain a Certification from the Regional Board, he failed to consult with his agent or Board staff prior to the installation of the French drain. In addition, although advised to stop grading work pertaining to the fill of the drainage by Board staff, Mr. Hearn made no attempt to do so and allowed the discharge of fill to occur for three additional days.

5. **Economic Benefit or Savings, if any, Resulting from the Violation**

Michael Hearn has realized substantial economic benefits by avoiding costs of delays in rough grading efforts due to permitting issues. Such costs of delays include financing costs, costs associated with idling and re-deploying grading equipment, potential costs associated with delivery of the property to buyers through escrow contingency costs, and costs of delayed procurement of revenues through sales or lease.

Michael Hearn has avoided costs associated with possible avoidance efforts by proceeding with a discharge of fill without authorization and thereby pre-selecting mitigation related to avoidance and minimization of impacts to the riparian drainage. Such costs include design costs, costs associated with more labor intensive grading methods to avoid impacting the riparian drainage, and possible costs of removing fill off-site that would have otherwise been discharged into the riparian drainage. Had Board staff not become aware of the discharge as the result of an unscheduled inspection, Mr. Hearn would have realized substantial economic savings by avoiding all costs associated with mitigating impacts to the drainage and riparian habitat.

Many of the above-mentioned costs are represented by the *opportunity cost of capital*, which can be calculated using generally accepted economic methods. The opportunity cost of capital represents the cost of choosing one course of action over another and the trade-offs of that choice. For Sampson Industrial Park, the choice presented to the proponents is to delay implementation of the project while resolving permitting issues or to proceed with the project in the absence of the 404 Permit, 401 Certification, and 1603 Agreement. By choosing to proceed with the project, Michael Hearn has avoided the opportunity costs related to potential delays. The avoided opportunity costs represent an economic benefit to Michael Hearn and his associates primarily as an unfair competitive advantage.

Board staff has calculated Michael Hearn's avoided opportunity cost as the difference between estimated revenues and estimated revenues received at some period in the relative future as the result of delaying the project. Revenues received at a later time are typically discounted at a rate that represents the widely accepted preference to receive revenues now versus later. The value obtained by applying a discount rate in this fashion is called the *present value* of receiving revenues later. The discount rate results in a lower present value and positively correlates with the avoided opportunity costs. Utilizing a potential delay period of 120 days, total estimated revenues of \$12.8 million, and a discount rate of 9%, Board staff has estimated that the avoided opportunity costs are approximately \$360,000.

The potential delay period is based upon the performance of LSA in supplying an amended mitigation plan with respect to the date that the violation was discovered. Total estimated revenues are calculated based on local square footage sales value obtained from a local commercial real estate broker and the square footage offered by Sampson Industrial Park advertised on the City of Corona's web pages. The discount rate is conservatively modified from the rate of 10% recommended by State Board economists. The reason for the reduction of the recommended rate is primarily to reflect the influence of historically low interest rates in the real estate lending sector.

It should be noted that all projects experience opportunity costs as the result of delays regardless of whether the delay is imposed by the project proponents or by external factors such as environmental permitting and entitlement. Subsequently, project proponents can only act to minimize, not eliminate, opportunity costs.

Typically, opportunity costs for projects are minimized through the proponents' pursuit of entitlement and environmental permitting concurrently as opposed to sequentially. As is illustrated by Sampson Industrial Park, errors in environmental permitting have the potential to be costly unless the applicant chooses to ignore permitting requirements and escapes detection by regulatory agencies.

Michael Hearn has also received additional economic benefit through the delayed implementation of the project's mitigation plan. Utilizing the Federal EPA's BEN model applied to the cost of the mitigation proposed by LSA, Board staff has estimated this economic benefit at approximately \$1,300.

Through avoidance of the above noted costs and realization of economic benefits, Michael Hearn has gained substantial competitive advantage over other dischargers who presently avoid or delay discharges of fill to waters of the US.

RECOMMENDATION

Board staff recommends that the Regional Board affirm the assessment proposed in Administrative Civil Liability Complaint Order No. R8-2003-0105.

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

IN THE MATTER OF:

**KDG Investments and Sampson
Industrial Park, Inc.
114 Pacifica, Suite 340
Irvine, CA 92618**

Attn : Michael Hearn

**ORDER NO. R8-2004-0018
FOR
ADMINISTRATIVE CIVIL LIABILITY**

The California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board), held a hearing on January 22, 2004 to receive testimony and take evidence on the allegations contained in Complaint No. R8-2003-0105, dated October 23, 2003, and on the recommendation for the imposition of an assessment of civil liability pursuant to Water Code Section 13385 in the amount of \$110,000. The Board finds as follows:

YOU ARE HEREBY GIVEN NOTICE THAT:

1. The discharger is alleged to have violated California Water Code Section 13376, which states, in pertinent part:

"Any person discharging or proposing to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or any person discharging (or proposing to discharge) dredged or fill material into the ...waters of the United States...shall file a report of the discharge..."

2. March 28, 2003, the discharger submitted an application for Clean Water Act Section 401 Water Quality Standards Certification (Certification) for the proposed Sampson Industrial Park, located between the 91 Freeway and Sampson Avenue and east of McKinley Street in the city of Corona. In subsequent supplements to that application, the discharger asserted that discharges of fill to waters of the US were limited to that area adjacent to a culvert crossing under Sampson Avenue totaling less than 0.01 acres of impact.
3. On June 12, 2003, Regional Board staff inspected the site and observed that the northerly reach of the riparian drainage, immediately east of the discharger's site and tributary to that portion of the drainage for which the discharger had submitted an application for Certification, had been excavated by heavy equipment and was in the process of being filled

without having submitted a report of the discharge required by Section 13376 and without having obtained a Certification. This drainage had previously been determined to be a water of the US by the discharger's agent.

4. Regional Board staff has assembled documentation, including rough grading plans dated January 27, 2003 and March 24, 2003 and the City of Corona's Planning Commission Staff Report dated March 10, 2003, that indicate that the discharger had prior knowledge of the proposed discharge of fill as early as January 27, 2003, and failed to report it in the application for Certification.
5. Based on discussions on June 25, 2003 and August 6, 2003, between Regional Board staff and the staff of the grading company that completed the work summarized above on behalf of the discharger, it is apparent that discharges of fill to the drainage occurred from June 5, 2003 through June 15, 2003, a period of 11 days.
6. Water Code Section 13385(a)(1), specifies that those who violate Water Code Section 13376 are liable civilly. As provided by Water Code Section 13385(c)(1), the Board can administratively assess a civil liability in an amount not to exceed \$10,000 for each day in which the violation occurs.
7. Pursuant to Water Code Section 13385(a)(1), the total maximum assessment for which Michael Hearn, dba KDG Investments and Sampson Industrial Park, Inc., is civilly liable is \$110,000 based on \$10,000 per day for 11 days of violation from June 5, 2003 through June 15, 2003.
8. Regional Board staff has considered staff costs in determining the amount of the civil liability. These costs have been calculated at \$7,500 for the investigation, enforcement, and administration of the civil liability in this matter.
9. Section 13385(e) specifies factors that the Board shall consider in establishing the amount of civil liability. These factors include: the nature, circumstances, extent, and gravity of the violation, and, with respect to the discharger, the ability to pay, the effect on ability to continue in business, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require. Section 13385(e) requires that, at a minimum, liability shall be assessed at a level that recovers the economic benefits derived from the acts that constitute the violation. The factors are analyzed in the

Staff Report for the Regional Board's Hearing of Complaint No. R8-2003-0105, Item No. 13, which is incorporated herein by reference.

10. Regional Board staff has considered the economic benefits that the discharger has gained through the discharge of fill. Using generally accepted economic methods, Regional Board staff has estimated that the discharger has realized \$1,300 in economic benefits through the delayed implementation of mitigation efforts. In addition, an estimate completed by Regional Board staff indicates that the discharger will realize approximately \$360,000 in economic benefit as an unfair competitive advantage through the avoided opportunity costs of capital.
11. Issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code Section 2100 et seq.) in accordance with Section 15321, Chapter 3, Title 14, California Code of Regulations
12. The Executive Officer is authorized to refer this matter to the Attorney General for enforcement.

IT IS HEREBY ORDERED that pursuant to California Water Code Section 13385(a)(1), civil liability is imposed on Michael Hearn, dba KDG Investments and Sampson Industrial Park, Inc., in the amount of \$110,000 for the violations cited.

Pursuant to Water Code Section 13320, you may petition the State Water Resources Control Board for review of this Order. If you choose to do so, you must submit the petition to the State Board within 30 days of the Regional Board's adoption of this Order.

I, Gerard Thibeault, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an order adopted by the California Regional Water Quality Control Board, Santa Ana Region, on January 22, 2004.

Gerard J. Thibeault
Executive Officer

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

IN THE MATTER OF:

**KDG Investments and Sampson
Industrial Park, Inc.
114 Pacifica, Suite 340
Irvine, CA 92618**

**)
)
) COMPLAINT NO. R8-2003-0105
) FOR
) ADMINISTRATIVE CIVIL LIABILITY
)
)**

YOU ARE HEREBY GIVEN NOTICE THAT:

1. KDG Investments and Sampson Industrial Park, Inc. (hereinafter discharger), is alleged to have violated provisions of law for which the California Regional Water Quality Control Board, Santa Ana Region (hereinafter Board), may impose civil liability pursuant to Section 13385(a) of the California Water Code (Water Code).
2. A hearing concerning this complaint will be held before the Board within 90 days of the date of issuance of this complaint, unless the discharger waives the right to a hearing. Waiver procedures are specified on page 3 of the complaint. If the hearing in this matter is not waived, it will be held during the Board's regular meeting on November 21, 2003 at the Eastern Municipal Water District's Board Room in Perris, CA. The meeting begins at 9:00 a.m. You or your representative will have an opportunity to appear and be heard and to contest the allegations in this complaint and the imposition of civil liability by the Board. An agenda for the meeting will be mailed to you not less than 10 days before the hearing date.
3. If the November 21, 2003 hearing is held, the Board will consider whether to affirm, reject, or modify the proposed administrative civil liability or whether to refer the matter to the Attorney General for recovery of judicial civil liability.
4. The discharger is alleged to have violated California Water Code Section 13376, which states, in pertinent part:

"Any person discharging or proposing to discharge pollutants to the navigable waters of the United States within the jurisdiction of this state or any person discharging (or proposing to discharge) dredged or fill material into the ...waters of the United States...shall file a report of the discharge..."

5. This complaint is based on the following facts:
 - A) On March 28, 2003, the discharger submitted an application for Clean Water Act Section 401 Water Quality Standards Certification (Certification) for the proposed Sampson Industrial Park, located between the 91 Freeway and Sampson Avenue and east of McKinley Street in the city of Corona. In subsequent supplements to that application, the discharger asserted that discharges of fill to waters of the US were limited to that area adjacent to a culvert crossing under Sampson Avenue totaling less than 0.01 acres of impact.
 - B) On June 12, 2003, Regional Board staff inspected the site and observed that the northerly reach of the riparian drainage, immediately east of the discharger's site and tributary to that portion of the drainage for which the discharger had submitted an application for Certification, had been excavated by heavy equipment and was in the process of being filled without having submitted a report of the discharge required by Section 13376 and without having obtained a Certification. This drainage had previously been determined to be a water of the US by the discharger's agent.
 - C) Regional Board staff has assembled documentation, including rough grading plans dated January 27, 2003 and March 24, 2003, that indicates that the discharger had prior knowledge of the proposed discharge of fill as early as January 27, 2003, and failed to report it in the application for Certification.
 - D) Based on discussions on June 25, 2003 and August 6, 2003, between Regional Board staff and the staff of the grading company that completed the work summarized above on behalf of the discharger, it is apparent that discharges of fill to the drainage occurred from June 5, 2003 through June 15, 2003, a period of 11 days.
6. Pursuant to Water Code Section 13385(a)(1), those who violate Water Code Section 13376 are liable civilly. As provided by Water Code Section 13385(c)(1) the Board can administratively assess a civil liability in an amount not to exceed \$10,000 for each day in which the violation occurs.
7. Regional Board staff has considered staff costs in determining the amount of the civil liability. These costs have been calculated at \$7,000 for the investigation, enforcement, and administration of the civil liability in this matter.
8. Regional Board staff has considered the economic benefits that the discharger has gained through the discharge of fill. Using generally accepted economic methods, Regional Board staff has estimated that the discharger has realized \$1,300 in economic benefits through the delayed implementation of mitigation efforts. In addition, an estimate completed by Regional Board staff indicates that the discharger will realize a minimum of \$360,000 in economic benefit as an unfair competitive advantage through the advanced receipt of revenues from the sale of properties.

9. The maximum liability, which the Board could assess administratively under Water Code Sections 13385(c)(1) for eleven days of violating Water Code Section 13376, is \$110,000.
10. Water Code Section 13385(e) specifies factors that the Board shall consider in establishing the amount of civil liability. Based upon consideration of those factors, it is proposed that administrative civil liability be imposed on the discharger in the amount of \$110,000.

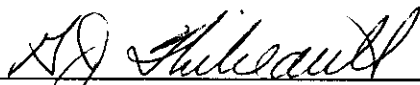
WAIVER OF HEARING

You may waive your right to a hearing. If you waive your right to a hearing, please sign the attached waiver and return it together with a check or money order made payable to the State Water Resources Control Board in the amount of the civil liability proposed in paragraph 8, above. Send the check and waiver to:

Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3348

If you have any questions regarding this complaint, please contact Gerard J. Thibeault at (909) 782-3284, Mark Adelson at (909) 782-3234, or contact the Regional Board's staff counsel, Jorge Leon, at (916) 341-5180.

10/23/03
Date



Gerard J. Thibeault
Executive Officer

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SANTA ANA REGION**

IN THE MATTER OF:

KDG Investments and Sampson
Industrial Park, Inc.
114 Pacifica, Suite 340
Irvine, CA 92618

COMPLAINT NO. R8-2003-0105
FOR
ADMINISTRATIVE CIVIL LIABILITY

WAIVER OF HEARING

KDG Investments and Sampson Industrial Park, Inc., agrees to waive its right to a hearing before the Santa Ana Regional Water Quality Control Board with regard to the violations alleged in Complaint No. R8-2003-0105. KDG Investments and Sampson Industrial Park, Inc. have enclosed a check in the amount of \$110,000.00. KDG Investments and Sampson Industrial Park, Inc. understands that it is giving up its right to be heard and to argue against allegations made by the Executive Officer in Complaint No. R8-2003-0105, and against the imposition of, and amount of the civil liability.

Date

For KDG Investments and Sampson
Industrial Park, Inc.



California Regional Water Quality Control Board

Santa Ana Region



Anton H. Hickox
Secretary for
Environmental
Protection

Internet Address: <http://www.swrcb.ca.gov/rwqcb8>
3737 Main Street, Suite 500, Riverside, California 92501-3348
Phone (909) 782-4130 - FAX (909) 781-6288

Gray Davis
Governor

*The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption.
For a list of simple ways you can reduce demand and cut your energy costs, see our website at www.swrcb.ca.gov/rwqcb8.*

October 23, 2003

Michael Hearn
KDG Investments/Sampson Industrial Park, Inc.
114 Pacifica, Suite 340
Irvine, CA 92618

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R8-2003-0105

Dear Mr. Hearn:

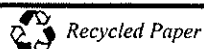
Enclosed is Complaint No. R8-2003-0105 assessing administrative civil liability for the unauthorized discharge of fill to a water of the US. The water of the US in question is a riparian drainage outside and along the eastern boundary of your property between the 91 Freeway and Sampson Avenue and east of McKinley Street, in the City of Corona. A public hearing on this matter has been scheduled for the Regional Board regular meeting on November 21, 2003, at 9:00 a.m., at the Eastern Municipal Water District's Board Room, Perris, California. An agenda and a staff report will be provided to you not later than 10 days prior to the meeting.

You may choose to waive your right to a public hearing. If you decide to do so, please complete the enclosed waiver form and submit it to this office prior to the hearing with a check for the proposed amount of civil liability (\$110,000). The check should be made payable to the State Water Resources Control Board. Should you waive your right to a public hearing and pay the proposed assessment, the November 21, 2003, hearing will not be held.

If you do not wish to waive your right to a hearing, you should contact this office to schedule a pre-hearing meeting. At that time, you may submit information that may not have been previously available to staff regarding this matter. The information should address the following items:

1. Nature, circumstances, extent and gravity of the violation;
2. Your ability to pay the proposed assessment;
3. Any prior history of violation;
4. Your degree of culpability;

California Environmental Protection Agency



5. Economic benefit, or savings, resulting from the discharge; and
6. Such matters as justice may require.

If you have any questions, or wish to schedule a pre-hearing meeting, please call Mark Adelson, Chief of the Regional Basin Planning Section, at (909) 782-3234, or Adam Fischer at (909) 320-6363.

Sincerely,



Gerard J. Thibeault
Executive Officer
Santa Ana Regional Water Quality Control Board

Enclosures: Administrative Civil Liability Complaint No. R8-2003-0105
Waiver of Hearing

cc: w/enclosures

Regional Board
State Water Resources Control Board, Office of the Chief Council – Jorge Leon
State Water Resources Control Board, Division of Water Quality – Oscar Balageur
U.S. Environmental Protection Agency, Region IX, Permits Issuance Section – Eugene Bromley (W-5-1)
U.S. Environmental Protection Agency, Region IX, Clean Water Act Compliance Office
U. S. Army Corps of Engineers, Los Angeles District—Dan Swenson
California Department of Fish & Game—Jeff Brandt

APF:401 enforcement/sampson~/ACLC R8-2003-0105 Letter

